No. 20526

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SCHNITZER STEEL PRODUCTS CO., a corporation,
Appellant,

vs.

CIA. ESTRELLA BLANCA, LTD., as owner of the S.S. NICTRIC, and AMTRO CORPORATION, S.A.,
Appellees.

AMTRO CORPORATION, S.A.,
Cross-Appellant,

vs.

SCHNITZER STEEL PRODUCTS CO., a corporation, and CIA. ESTRELLA BLANCA, LTD.,
Cross-Appellees.

Reply Brief for Cross-Appellant Amtro Corporation, S.A. on Cross-Appeal.

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Most of the points urged in Schnitzer's brief on Cross-Appeal are fully answered in Amtro's Opening Brief, and will not be covered again here. The following can be added:

I.

DAMAGES FOR BREACH OF CONTRACT AND TORT.

A. Schnitzer Asserts That the Damages Sought by Amtro Amount to a "Penalty" Against Schnitzer for the Assertion of a "Good Faith" Defense to Liability for the Demurrage. Schnitzer Is Wrong on Both Counts:

1. The damages sought by Amtro are not, as Schnitzer asserts (Br. p. 12), a "penalty." They are only the actual damages suffered by Amtro as the direct result of Schnitzer's failure to discharge the vessel within the time agreed in the charter and Schnitzer's subsequent failure to pay the demurrage. The admitted facts demonstrating this are outlined on pages 12-14 of Amtro's Opening Brief. Schnitzer (Br. p. 10) advances some speculations in an attempt to cast doubt on the causal connection between Schnitzer's acts and Amtro's damages. There is no support whatever in the record for any of the speculations advanced. Mr. Stewart, Amtro's managing officer, testified at the trial, and Schnitzer could have inquired into these matters by cross-examination had it cared to. The Pre-Trial Order gave ample notice of Amtro's contentions on the material points [R. Vol. I, p. 111, lines 28-29; p. 112, lines 2-5].

Schnitzer complains (Br. p. 12) of having been required to decide at its peril whether to pay what it now calls the "disputed" obligation, or to contest it and bear the damages to Amtro caused thereby. The complaint is a strange one. Throughout the various relationships governed by the law, a party must always act at its peril to that extent. There was nothing "unforeseen"

about these damages at the time Schnitzer made its decision not to pay. At that time, upon the completion of discharge of the Nictric, Schnitzer had specific notice from Amtro of the damages which would be caused to Amtro by Schnitzer's refusal of payment.

What Schnitzer is really claiming is a vested interest in the invariable application of the common rule limiting damages to interest on the money. Schnitzer wants always to be able to say, "Since the damages, if I refuse to fulfill my contract, are limited to interest in any event, and since I can use the money more profitably than the interest rate, why should I pay?" Any mechanical rule permitting a party to calculate its advantages in this way, no matter what the consequences to the other party, is manifestly unjust. None of the cases which we have been able to find limiting damages to interest, including *Loudon v. Taxing District of Shelby County,* 104 U.S. 771, 26 L. Ed. 923 (1882), cited by Schnitzer, involve situations where the party refusing to pay did so in the face of notice of the damages which would be caused thereby to the other party.

By the same token, none of those cases involve situations where the damages flowed both from the breach of an obligation to pay money and from the breach of another contractual obligation, such as the obligation of Schnitzer under the voyage charter to discharge the vessel on time. While it is true, as Schnitzer points out (Br. p. 9) that these damages would have been avoided if Schnitzer had paid the demurrage, it is equally true that they would have been avoided if Schnitzer had discharged the vessel within the time contracted.

2. Throughout its brief, Schnitzer asserts that there was a "good faith" question whether it was liable for

the demurrage. Schnitzer further argues (Br. p. 12), "It is not reasonable to assume as Amtro does that Schnitzer would arbitrarily and without good faith belief in its position refuse to pay the demurrage after notice . . .". This is no "assumption" on Amtro's part. It is what the evidence indubitably shows. The "question" raised by Schnitzer at the trial and on this appeal concerning its liability for the demurrage is based on an interpretation of the charter exactly opposite to the interpretation Schnitzer was adopting at the time it faced the alternative, and decided not to pay. The District Court so found [R. Vol. I, pp. 140-141]. The evidence compelling that finding is set forth and analyzed in owners' brief, pages 14-19, and in Amtro's answering brief on Schnitzer's appeal, pages 11-14. Schnitzer was not, as its brief asserts (Br. p. 14), "one who fails to perform a contractual obligation to pay a sum of money in the belief that he is not liable for it."

B. Amtro Did Not Fail to Act Reasonably to Mitigate Its Damages.

Schnitzer claims that Amtro could have collected the demurrage by exercising a lien on the cargo, and could have thereby avoided loss of the time charter (Br. p. 11). Schnitzer suggests that Amtro could have exercised its lien on the cargo by stopping discharge until the consignees paid or gave security for the demurrage, or could have sold the cargo to collect these sums. But the District Court specifically found that if Amtro had done this, "the ship risked not only the possibility but also the probability of being moved by the harbor authorities and sent to anchor outside to await another turn at discharge" [R. Vol. I, p. 142]. The evidence supporting this finding is thoroughly discussed in

Owners' brief. Obviously the wait for another turn to discharge would have produced additional demurrage far in excess of the amounts Amtro is now claiming as damages.

Moreover, the time charter [Lib. Ex. I] clauses 4 and 5, required payment of the charter hire in cash in U. S. currency. The voyage charter [Lib. Ex. II] clauses 18 and 1, likewise required Schnitzer to pay the demurrage and freight in U. S. currency. Schnitzer does not attempt to explain how Amtro could have obtained U. S. currency with which to pay the time charter hire from the Japanese consignees or by liening the cargo in Japan.

C. Amtro Is Entitled to These Damages for Breach of Contract.

For the proposition that notice of consequential damage given after the contract was made and before breach is not enough to charge the breaching party with liability for the consequential damages, Schnitzer cites only the remark which it quotes (Br. p. 7) by Justice Holmes in *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U.S. 540, 23 S. Ct. 754, 47 L. Ed. 1171 (1902). This remark was not a holding of the court, or a considered opinion of Justice Holmes on a question which made any difference to the issues presented for decision. There was no allegation in that case (as there is evidence in the present one) that the defendant had received notice of the consequential damages at a time when the defendant was able to perform, and simply chose not to perform.

The only holding we have been able to find on the contract law question presented in this case (and

Schnitzer has apparently been able to find nothing to the contrary) is the decision of the Supreme Court of Texas in

> *Bourland v. Choctaw, O. & G. Ry. Co.*, 99 Tex. 407, 90 S.W. 483 (Supreme Court of Texas. 1906),

discussed and quoted in Amtro's Opening Brief pages 21-25. We submit that the reasoning of this case is correct and should be followed.

D. The Damages Are Also Recoverable Against Schnitzer in Tort.

It is not true, as Schnitzer seems to be asserting in its brief, that actionable interference with contractual relations arises only where the actor induces a breach of the collateral contract in order to garner its advantages to himself. The actor may be equally liable in tort where he has interfered with the collateral contract in pursuit of his own unrelated ends, but with knowledge that his conduct will prevent performance of the collateral contract. It is not a necessary element of the tort that the tort-feasor hope to profit by taking over the benefits of the collateral contract. The conduct is equally tortious where the tort-feasor does what he does in order to benefit in some other way, unless the objective sought by the tort-feasor and the means used are privileged. This is the holding of the two admiralty cases on the tort.

> *Sidney Blumenthal & Co. v. United States*, 30 F. 2d 247 (2 Cir. 1929), cert. den. 279 U.S. 847, 73 L. Ed. 991, 49 S. Ct. 345;
>
> *The Poznan*, 276 Fed. 418, 433 (S.D. N.Y. 1921, L. Hand, D.J.)

the facts and holding of which are set forth in Amtro's opening brief, pages 35-38, and of

Keene Lumber Co. v. Leventhal, 165 F. 2d 815 (1 Cir. 1948)

discussed on page 38 of Amtro's Opening Brief. That is also the view of the textwriters

Prosser, Torts, 3rd Ed. page 960;

Harper and James, Law of Torts (1956), Volume I, page 499.

See also

Restatement of Torts, §766, comment d.

It is not true, as Schnitzer contends, that the claim for tortious interference with the performance of the time charter is one which could only be asserted by Owners in this case. The tort is actionable by either party to the contract interfered with.

Harper and James: Law of Torts (1956), Volume I, page 499.

Schnitzer's citation (Br. p. 15) of the *Blumenthal* case as supporting its contention is incorrect. In the *Blumenthal* case, the facts in which are discussed at length in Amtro's Opening Brief, pages 35-36, the U. S. Fleet Corporation was held liable to the cargo owners because the managing agents for the vessel transshipped the cargo on another vessel in violation of the terms of the bill of lading issued by U. S. Fleet Corporation to cargo. The U. S. Fleet Corporation was thus liable to cargo because the performance of its contract with cargo had been prevented by the managing agents. U. S. Fleet Corporation impleaded the managing agents for indemnity, seeking to recover from the managing agents the amount by which the U. S. Fleet Corporation had been

held liable in damages to the cargo owners. The U. S. Fleet Corporation was held entitled to recover these amounts from the managing agents for their tortious interference with the performance by the U. S. Fleet Corporation of its contract with cargo. The position of the U. S. Fleet Corporation in that case was exactly analogous to Amtro's position in this case, and that decision exactly supports Amtro's recovery against Schnitzer here.

Schnitzer's tort liability to Amtro thus depends solely on the question whether Schnitzer was privileged to do what it did. Schnitzer asserts in its brief that it refused payment in the "belief" that it was not liable for the demurrage and, in effect, claims a privilege on that ground. Whatever Schnitzer may believe now, the record contradicts any such belief on Schnitzer's part at the time, just before and immediately following discharge of the Nictric, when Schnitzer refused to pay Amtro. Schnitzer's present argument that it is not liable for the demurrage under the voyage charter is based entirely upon the contention that the charter required Amtro to look first to its lien upon cargo for the collection of the demurrage, that Schnitzer is liable only if it was impossible to exercise the lien, and that the lien could have been exercised. The position being taken by Schnitzer at the time Amtro demanded payment and pointed out to Schnitzer the consequences of non-payment, was exactly the reverse, namely that *Amtro had no lien*. This was the finding of the District Court [R. Vol. I, p. 141, lines 5-9]:

> "Subsequently Schnitzer's counsel took the position that in fact there was no lien on cargo for the demurrage. Schnitzer relied on this construction of the contract from about November 17 until after the cargo had been discharged on December 31."

The evidence compelling that finding has been pointed out in Amtro's and owners' prior briefs.

Moreover, Schnitzer could have had a good faith belief *at that time* in the validity of its present defense to liability for the demurrage only if it had had *at that time* some information that a lien could be exercised in Japan. The uncontradicted evidence (discussed in owners' brief, pages 14-19 and in Amtro's answering brief on Schnitzer's appeal, page 13) shows that Schnitzer was advised by Amtro on December 12, 1961, and by Owners on December 14, 1961, that they each believed that it was impossible to exercise the lien in Japan. If Schnitzer had had any information to the contrary at that time, or if Schnitzer had believed at that time, as it now contends, that the exercise of the lien on the cargo in Japan would have forced the consignees and not Schnitzer to pay the demurrage, good faith and Schnitzer's own interests would have compelled Schnitzer to advise Amtro and Owners immediately of the methods by which Schnitzer believed that the lien could be exercised, and to withdraw immediately its threat of December 6 [Lib. Ex. 34] to hold owners liable in damages if they attempted to exercise a lien. Schnitzer did neither. Schnitzer kept entirely silent for fifteen days, until 2½ hours before the completion of the Nictric discharge, and then sent Amtro an unexplained denial of liability. Schnitzer did not advise Amtro or owners of its present contention that there was a lien, or of any of the methods by which it now contends a lien could have been exercised, until nearly a year later.

While the charter was in effect and the Nictric was in Japan, Schnitzer either had no belief at all in the validity of its present alleged defenses, or Schnitzer de-

liberately set out to trap Amtro. On either explanation, Schnitzer committed a tort against Amtro.

II.
EXTRA EXPENSES.

If, as Schnitzer contends, the "extra expenses" referred to in clause 1 were intended to be limited to "extra expenses of loading, stowing, discharging or caring for cargo of such a nature as to require unusual handling, or to possible unusual expenses in shipping a quantity of turnings in the cargo," it would have been easy for the parties to say so in the charter. The language contains no such limitations. The clause provides that "any [not just some as Schnitzer would have it] extra expenses incurred *by reason of nature of cargo* [not in the handling of cargo, or in shipping turnings, as Schnitzer would have it]" are to be for Schnitzer's account.

Any ambiguity must be resolved against Schnitzer since, as the District Court found, the language of the charter was Schnitzer's [R. Vol. I, p. 140]. Mr. Bettinger of Sea Charter Co. did not, as Schnitzer contends "negotiate the voyage charter as to both parties." Under the evidence which is set out in owners' brief, pages 10-12, Sea Charter was Schnitzer's broker. A broker is ordinarily the agent of one or the other of the parties, and can act as the agent of both only in special circumstances.

> 12 Am. Jur. 2d Brokers §1, page 272, §30, page 295, §67, page 821.

That Sea Charter was Schnitzer's broker was stated by Dr. Leonard Schnitzer in his testimony [R. Vol. II, p. 210, line 24, to p. 211, line 1].

"All negotiations for the completion of that charter were handled *by us* through Sea Charter, *our* broker. (Italics supplied)".

How Sea Charter came to call itself a broker in this transaction at all was explained by Dr. Leonard Schnitzer as follows [R. Vol. II, p. 174, line 2, to p. 175, line 7]:

"They had been acting as my agent in Portland for handling vessels that I chartered through other ship brokers, because they were ships' agents here in Portland, and I gave them business husbanding vessels, bringing people in, taking care of customs, and that sort of problem that a ship agent normally does. And during these particular negotiations I had conversations with Captain Jensen, and particularly Bettinger also. They asked if they could act as broker for us. As broker there is more commission than there is in just husbanding a vessel. So he asked if he could participate in this type of business with us, and I said, 'Yes. If you ever get a vessel, let me know.' "

The evidence showing the part of the delay that was due to the nature of the cargo, and the amount of the extra expenses, has been reviewed in Amtro's Opening Brief on the Cross-Appeal, and will not be repeated here. One thing should be pointed out. Schnitzer asserts (Br. p. 19), that "The court found that Harumi Wharf could not be used because discharge could not occur in seven days, not because the cargo was scrap." This misstates the finding of the District Court. What the District Court found was that

"Schnitzer's agent tried to put the vessel in at this particular wharf. but could not do so on account of

> the nature of the vessel's scrap. The scrap could not be discharged in seven days, and therefore was not eligible for space at the particular wharf." [R. Vol. I, p. 143].

The evidence on which the District Court undoubtedly relied for this finding showed that the particular nature of the scrap placed by Schnitzer aboard the Nictric, in that it consisted of a mixture of varied types difficult to discharge, made it impossible to discharge the scrap within the seven days referred to. This was the testimony of Schnitzer's own witness, Mr. Koizumii, of Pacmarine, Schnitzer's agent [Ex. 44H, p. 187-26, line 19, to p. 187-27, line 2]. This was also the statement of Schnitzer's admitted employee, Mr. Morgulis, as shown by Exhibit B11, page 1, the admissibility of which is pointed out on page 31 of Owners' Brief. The extra expense for which Amtro seeks to recover was thus incurred not only by reason of the fact that the cargo was scrap, but by reason of the particular nature of this particular scrap cargo, as compared with other scrap cargos.

It is true, as Schnitzer points out (Br. pp. 19-20) that the demurrage rate was the subject of negotiation and was agreed at a rate below that necessary to cover the actual expenses of operating the vessel. Obviously part of the bargain which led Amtro to accept this low demurrage rate *applicable to delay generally* was the additional provision in clause 1 obligating Schnitzer to pay "any" extra expenses incurred by reason of nature of cargo, without limitation, thereby obligating Schnitzer to pay the extra expenses over and above the demurrage rate in the event that the vessel was delayed

from causes particularly attributable to the nature of the cargo placed on board the vessel by Schnitzer.

Demurrage provisions in a charter do not necessarily exclude other obligations of the parties on the same subject matter, where one of the parties has assumed an additional obligation in another clause. For example, in the

Ala., 1926 A.M.C. 1404 (S.D. N.Y. 1926)

a demurrage clause providing a certain number of lay days for loading was held not to detract from another provision in the charter stating that owners guaranteed to sail the vessel on or before a particular date.

III.

CLAUSE 23 OF THE TIME CHARTER RELATING TO CREW OVERTIME.

The District Court obviously relied exclusively on the testimony of Captain Cassimatis set forth in owners' brief (pp. 39-42) as its basis for interpreting the clause as it did. The District Court was in error in giving such weight to what Captain Cassimatis said. Captain Cassimatis never participated in negotiation of the time charter. Owners introduced no evidence whatever that his understanding of the clause was ever communicated to Amtro. He was the manager for the owners, and his testimony is entirely self-serving. It should not have been allowed to prevail over the only logical analysis of the clause within its four corners, which is the analysis set out in Amtro's Opening Brief.

CONCLUSION.

It is accordingly respectfully submitted that, while the District Court should be affirmed on the issue of Schnitzer's liability for freight and demurrage, it should be reversed on all of the points raised by Amtro's Cross-Appeal, with directions to modify its decree accordingly.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BERNARD E. O'CONNOR, JR.